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No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH,
Petitioner

v.

WILLIAM R. LUCAS,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICI CURIAE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AND NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION

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INTEREST OF THE AMICI

The Public Employee Department of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and the National Weather Service Employees Organization (affiliated with the Marine Engineers' Beneficial Association, AFL-CIO) file this brief, *amici curiae*, in support of the Petition for Certiorari of William Bush, pursuant to Rule 36 of the Rules of the Supreme Court.[1] The Public Employee Department

[1] All parties consented to the filing of this *amici curiae* brief.

is an association of national and international labor unions which are affiliated with the AFL-CIO and have members employed in the public sector. The National Weather Service Employees Organization is the exclusive bargaining representative for approximately four thousand employees of the National Weather Service in the National Oceanic and Atmospheric Administration of the Department of Commerce, pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. § 7111. The objectives of the *amici* include promoting and securing improved wages, hours and working conditions through collective bargaining, legislation and other appropriate means.

The Public Employee Department and the National Weather Service Employees Organization offer their *amici curiae* brief in this case on behalf of the interests of the federal employees who may be affected by the decision of this Court.

SUMMARY OF ARGUMENT

This case presents the question of whether a civilian employee of the United States government has a cause of action against his supervisor or superior *as an individual* for constitutional violations occurring in an employment context. The Petitioner is a career civilian employee of the National Aeronautics and Space Administration who brought an action against his superior, the Respondent herein. Petitioner alleged that he was improperly demoted by the Respondent in violation of his First Amendment protections in retaliation for publicly criticizing the management of the agency concerning waste. In the Court of Appeals the Petitioner contended that his status as a federal employee does not deprive him of a cause of action against a federal agent for constitutional violations when such a cause of action exists for all other citizens pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The United States Court of Appeals for the Fifth Circuit held, however, that federal employees may not seek

damages from other individual federal employees or officials for constitutional violations. The Court of Appeals ruled that the existence of an available remedy under Civil Service Commission regulations to reinstate the Petitioner to his former position deprived him of a cause of action against his superior as an individual.

The Petition for Certiorari should be granted because the decision of the Court of Appeals conflicts with the decisions of this Court in *Bivens v. Six Unknown Fed. Narcotics Agents* and *Carlson v. Green*, 446 U.S. 14 (1980).[2] *Carlson v. Green* made it clear that a *Bivens* remedy for constitutional violations exists unless Congress has provided an alternative remedy which it explicitly declared to be a substitute for a *Bivens* remedy and which is equally effective, or unless there was some other special factor counselling hesitation. *Id.* at 18-19. The Court of Appeals used the existence of a partial remedy under civil service regulations as an excuse for defeating the Petitioner's cause of action by anointing it a "special factor counselling hesitation." It is clear from this Court's decision in *Carlson v. Green* that an alternative remedy is not a "special factor counselling hesitation" and should not defeat a *Bivens* remedy unless Congress explicitly provided that the alternate remedy is to be a substitute for a *Bivens* remedy and is equally effective. The Court of Appeals has treated this case as an action brought by an employee against his employer, the United States, to be reinstated to a position from which he was improperly removed. However, this case is solely an action for damages brought by one employee against another employee, *as an individual*, who allegedly misused his office to violate the Petitioner's constitutional rights.

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[2] The instant case was previously before this Court which vacated an earlier judgment of the Court of Appeals and remanded it for further consideration in light of *Carlson v. Green*. *Bush v. Lucas*, 446 U.S. 914 (1980).

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND HAS DEPRIVED MILLIONS OF CITIZENS IN FEDERAL EMPLOY OF AN AVENUE FOR REDRESSING CONSTITUTIONAL VIOLATIONS.

A. A *Bivens* Remedy Is The Rule, Not The Exception.

Damage suits for vindication of individual rights date from the eighteenth century in England and have been widely recognized in our courts. *Halperin v. Kissinger*, 606 F.2d 1192, 1207 (D.C. Cir. 1979) (and cases cited therein at n.98). *Bivens v. Six Unknown Fed. Narcotics Agents* established that the victim of a constitutional violation by a federal official or agent has a right to recover damages from the official in federal court despite the absence of any statute conferring that right. This Court stated in *Bivens* that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395.

In *Carlson v. Green*, which held that a plaintiff could maintain an action for damages against federal prison officials for constitutional violations even though she could bring an action for damages under the Federal Tort Claims Act, this Court stated that a *Bivens* remedy can only be precluded in two situations:

> The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress". The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.

446 U.S. at 18-19. (citations omitted). This Court found that neither of these situations were present in *Carlson*, despite the existence of the second remedy for the plain-

tiff under the Federal Tort Claims Act. This alternate remedy was neither an explicit substitution nor a "special factor counselling hesitation." However, the Court of Appeals in the instant case has held that the alternative partial remedy afforded the Petitioner by civil service regulations is a "special factor counselling hesitation" and denied him a *Bivens* remedy.[3]

The Fifth Circuit has deprived the Petitioner of basic rights afforded other citizens merely because of his status as a federal employee, without any real countervailing government interest at stake which warrants such a limitation as is required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).[4] The unique decision of the Court of Appeals herein affords federal employees less constitutional protection than federal prisoners. *See, Carlson v. Green.*

B. There Are No "Special Factors Counselling Hesitation" In The Instant Case.

The "special factors counselling hesitation" which the Court of Appeals found in this case are spurious. In refusing to allow a *Bivens* remedy to aggrieved individuals who are federal employees, the Court of Appeals stated:

> The roll of the Government as an employer towards its employees is fundamentally different from its role as sovereign over private citizens generally . . . [it is a] "well established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.' "

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[3] Petitioner was reinstated with back pay by the Civil Service Commission's Appeals Review Board almost three years after he appealed his demotion through administrative channels. Petition for Certiorari, No. 81-469, pp. 13, 17.

[4] In *Pickering v. Board of Education*, this Court held that a teacher's exercise of his right to speak on issues of public concern can not furnish the basis for dismissal from public employment unless the statements made are knowingly or recklessly false. 391 U.S. at 574.

647 F.2d at 576. However, the court below has misperceived the nature of this case. It is not a dispute to settle an internal government-employee relations problem. It is an action brought by one individual against another individual who has misused his public office.

There will be no government interest served by denying a *Bivens* remedy to the Petitioner. It will not encourage aggrieved federal employees "to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the government of the opportunity to work out its personnel problems within the framework" it established, as the Court of Appeals believes. 647 F.2d at 577. The Petitioner's suit against the Respondent could never have reinstated the Petitioner to his proper grade level in the government, because the United States is not a party to this action. The administrative remedy under the civil service regulations could never compensate the Petitioner for the punitive and other damages he seeks in this action for the violation of his constitutional rights. The fact that the Petitioner has pursued his administrative remedy to seek reinstatement in addition to bringing this action evinces that a *Bivens* remedy will not encourage federal employees to bypass statutory and administrative remedies as the court below fears.

A *Bivens* remedy in this case would promote, rather than hinder, the government's effective operation of its personnel programs and practices. It would deter other federal officials and agents from abusing the federal personnel system by engaging in unconstitutional acts such as race or gender discrimination, *see, Davis v. Passman*, 442 U.S. 229, 234-235 (1979), retaliation for criticism of government policies, *see, Pickering v. Board of Education*, 391 U.S. at 574, or retaliation for public exposure of government waste, as is alleged herein. This Court took note of the importance of deterring future constitutional violations in *Carlson v. Green* when it granted a cause of action in addition to the Federal Tort Claims Act remedy:

> . . . the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability * * *
>
> Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

446 U.S. 21, 22 (citations and footnotes omitted). A *Bivens* remedy would also promote the effectiveness of the administrative remedy because its deterrent effect will reduce the number of cases under administrative review. In the Petitioner's case, almost three years elapsed between the date on which he invoked an administrative appeal of his grade reduction and the date on which he was reinstated to his proper position.

It is clear from this Court's decision in *Bivens* and in *Carlson v. Green* that the existence of another partial remedy for a constitutional violation is not what this Court meant by "a special factor counselling hesitation." This Court has clearly stated that only alternative remedies which Congress *explicitly* indicated to be a substitute for a *Bivens* remedy and which provide an equally effective remedy will preclude a *Bivens* action. In the instant case, the Court of Appeals has pointed to nothing in the legislative history of the civil service laws or the new Civil Service Reform Act of 1978 which indicates that an administrative remedy was intended to be exclusive. Punitive damages were not available to the Petitioner as relief in the administrative remedy and therefore the administrative remedy is "much less effective than a *Bivens* action as a deterrent to constitutional acts." *Carlson v. Green*, 446 U.S. at 22. The Court of Appeals has ignored the clear intent of this Court by designating the administrative remedy, which is neither an explicit substitute nor equally effective, as a "special factor counselling hesitation." In justifying

this result, the Court below said "the result in this case might be different if failure to recognize a *Bivens* remedy would leave Bush . . . without *any* remedy . . ." 647 F.2d at 577 (emphasis supplied). This Court has made it clear that only those remedies which are equally effective will preclude a *Bivens* cause of action:

> . . . the inquiry is whether Congress has created what it views as an equally effective remedial scheme. Otherwise the two can exist side by side.

Carlson v. Green, 446 U.S. at 22, n.10. The Court of Appeals' reasoning which accepts any remedy as a substitute for a *Bivens* remedy is clearly at odds with the law as pronounced by this Court.

The decision below is also incorrect when it states that "[t]here is little guidance in the Supreme Court Opinions as to what 'special factors' will justify withholding a *Bivens* remedy." 647 F.2d at 576. In *Bivens*, this Court analyzed several special factors which might preclude a cause of action, such as situations which raise "a question of 'federal fiscal policy'." 403 U.S. at 396. This case does not raise a question of federal fiscal policy at all because recovery is sought only from the Respondent, an individual, and not from the United States. This Court expanded on the meaning of "special factors counselling hesitation" in *Butz v. Economou* when it held that federal officials may not "willfully or knowingly violate constitutional rights without fear of liability." 438 U.S. 478, 495 (1978):

> In *Bivens*, the Court . . . looked for "special factors counselling hesitation." 403 U.S., at 396. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, *id.*, at 397, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim, see *id.*, at 409 (Harlan, J. concurring in judgment).

438 U.S. at 478. The Petitioner's claim herein is compensable in damages and the district court is qualified

to handle the type of questions raised by the Petitioner's claim. Therefore there are no special factors counselling hesitation against allowing him to litigate his claim in district court.

CONCLUSION

In *Pickering v. Board of Education*, the Court said that it was "essential" that public employees "be able to speak out . . . without fear of retaliatory dismissal." 391 U.S. at 572. The availability of an administrative remedy for the Petitioner clearly did not deter the Respondent from dismissing him in retaliation for publicly exposing government waste. Something more is obviously needed to protect the constitutional rights of public employees. Chief Justice Marshall wrote that "[t]he very essence of civil liberty certainly consists in the right of *every* individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 CRANCH 137,163 (1803) (emphasis supplied). There are no reasons why a *Bivens* remedy should be denied the Petitioner and other federal employees when it is accorded all others.

For these reasons, the *amici* respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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